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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRE PETROSYAN,

Defendant and Appellant.

B262336

(Los Angeles County
Super. Ct. No. BA428665)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Edmund Willcox Clarke, Jr., Judge. Affirmed.

Cyn Yamashiro, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

In an information filed by the Los Angeles County District Attorney, defendant and appellant Andre Petrosyan was charged with three counts of second degree robbery (Pen. Code, § 211; counts 1-3),¹ dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1); count 4), and vandalism under \$400 (§ 594, subd. (a); count 5). As to counts 4 and 5, it was further alleged that defendant had been convicted of two prior serious and/or violent felonies. (§§ 667, subds. (a)(1), (d); 1170.12, subd. (c).) As to counts 1 through 4, it was further alleged that defendant suffered four prison priors. (§ 667.5, subd. (b).)

Defendant pleaded not guilty and denied the special allegations. The jury found defendant guilty as charged, and the trial court found the prior conviction allegations to be true. The trial court then struck one of defendant's prior strikes and sentenced him to 26 years in state prison. He was ordered to pay various fines. And, he received 202 days of custody credit.

Defendant timely appealed. On appeal, he argues that the trial court erred when it allowed a witness's preliminary hearing testimony to be read to the jury.

We affirm.

FACTUAL BACKGROUND

I. Prosecution Evidence

A. Defendant robs Kamal Ibrahim (Ibrahim)

On August 22, 2014, at approximately 10:30 a.m., Ibrahim² was inside the La Canasta Market in Los Angeles. He owned the market. Defendant entered the store and said that he wanted to buy a hat. Ibrahim identified himself as the owner and told defendant that he did not sell hats. Defendant accused Ibrahim of being disrespectful. As Ibrahim accompanied defendant out of the store, defendant pushed him. At the time,

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² Following the trial court's finding that Ibrahim was unavailable as a witness, his preliminary hearing testimony was read to the jury. Defendant's challenge to this finding is discussed below.

defendant's other hand was behind his back. Ibrahim was scared and retreated to an area behind the counter.

Defendant then approached Ibrahim and said that he wanted to buy cigarettes. When Ibrahim gave him the cigarettes and stated the price, defendant said that he did not want to pay. Ibrahim replied, "Okay, take it. I gave it to you. Just take it and go." Defendant also took two bags containing pickles, five cans of Coke, and water. Defendant left the market.

B. Defendant robs Alfred Lopez (Lopez) and Lisbeth Rubio (Rubio) and dissuades a witness from reporting a crime

At approximately 11:00 a.m. that same day, Lopez was inside his car with his son, Cole, in a parking lot near a Subway restaurant. They were exiting when a man, later identified as defendant, approached Cole. Defendant leaned into the car and asked Cole if he had any money. Defendant came within one foot of Cole and was close enough that Cole could smell him.

Lopez told defendant to step away from his son. Defendant became hostile and placed his knee on the passenger seat of the car. The upper portion of defendant's torso was now inside the car and his face was approximately one foot away from Lopez's face. Defendant said to Lopez, "What the fuck's your problem. I'm not doing anything with your son. You see me hurting him?"

Defendant demanded 50 cents from Lopez for bus fare. When Lopez said that he did not have the money, defendant replied, "I'm gonna start shooting up this whole parking lot." Defendant said that he had a ".45 in his pants and that he would start unloading it" if Lopez did not give him what he wanted. Cole believed that defendant might have had a pistol.

Lopez did not know whether defendant was carrying a gun; he just wanted to get himself and Cole away. Defendant then told Lopez, "I have some of my homies back there. I'll just have him come shoot up your car. All your tires will be slashed." Lopez believed that defendant was becoming more agitated and he agreed to give him bus

money. Lopez had a \$50 bill and a \$20 bill; he planned to go to the Subway to get change for one of the bills and give some of that money to defendant.

As they walked to the restaurant, defendant repeated his demands for Lopez's money. At one point, defendant swung at Lopez with a closed fist. Lopez managed to avoid the swing, but it "glanced off [his] shoulder a little bit."

When they entered the Subway, defendant approached the front counter where Rubio was working. When she offered to help defendant, he became angry and screamed, "Shut the fuck up." She walked to the back of the restaurant because she was scared. Defendant took the money from the tip jar and placed it inside his pocket. When another Subway employee confronted defendant about the tip jar money, he told her to shut up and to get away from him. Defendant reached into his pocket as he made these remarks. Rubio believed that he might have a weapon. When she picked up the telephone to call the police, defendant told her that he would kill her if she called the police. She was scared for her life.

Defendant then approached Lopez again. He threatened to stab Lopez with a knife if he did not give defendant money. Lopez was afraid for his personal safety, so he handed defendant \$50 and told defendant to leave.

When defendant left the Subway and went outside, he encountered Cole, who was attempting to call the police. Defendant tried to grab Cole's phone, but Cole pushed him away. Defendant then boarded a bus.³

Four videos depicting defendant's conduct inside the Subway were shown to the jury. The videos showed, among other things, defendant approaching the cash register, reaching into the tip jar, and apparently telling people not to call the police.

II. Defense Evidence

Defendant testified on his own behalf. In 1997, he was convicted of false imprisonment. In 1999 and 2010, he suffered convictions for making criminal threats.

³ The bus would not leave with him on it.

On August 22, 2014, defendant remembered buying some beer from a market. He did not remember seeing or speaking with Lopez or his son in the parking lot near the Subway. He was not carrying a gun that day.

Defendant admitted that he was depicted in the Subway videos, but he did not remember going inside. He admitted that the videos showed him taking money out of the tip jar, but he did not remember doing that. He believed that it was possible that he asked for the money in the tip jar. He did not remember telling Rubio that he would kill her if she called the police.

DISCUSSION

Defendant contends that, under Evidence Code sections 240 and 1291, Ibrahim was not unavailable as a witness; therefore, the trial court erred when it allowed his preliminary hearing testimony to be read to the jury. In a related argument, defendant claims that the admission of Ibrahim's preliminary hearing testimony violated the Confrontation Clause of the California Constitution because it was not reliable.

A. Relevant Procedural Background

On September 9, 2014, at the preliminary hearing, Ibrahim testified about how defendant robbed him.

On September 23, 2014, the matter was set for trial on November 18, 2014.

On November 18, 2014, the matter was called and trailed to November 20, 2014. At defendant's request, the case was continued to December 2, 2014.

Following a break in the voir dire proceedings on December 2, 2014, the prosecutor advised the trial court that during the break, he had been informed from his office's witness coordinators that Ibrahim was in Jordan and would not return until sometime in January. The prosecutor requested, subject to a determination of due diligence, that Ibrahim's preliminary hearing testimony be admitted into evidence due to his unavailability.

The following day, Los Angeles County District Attorney Investigator Joe Flannagan (Flannagan) testified at the due diligence hearing. He stated that he had been tasked with serving Ibrahim. On November 7, 2014, he went to Ibrahim's business

address; the business was closed and empty, and it appeared that there was no business there. He spoke with the clerk of a nearby store; that clerk said that Ibrahim's store had "just closed," giving the impression that the store had closed "all of a sudden."

Flannagan testified that he then went to Ibrahim's residential address and knocked on the door. When no one answered, he left his business card at the front door, asking Ibrahim to contact him. Approximately one hour later, Flannagan received a telephone call from a woman with a Middle Eastern accent. She said that she was calling in response to the business card he had left at her door. The woman said that Ibrahim was her husband, that he was in Jordan because his father was seriously ill, and that he would not return for about two months. Flannagan did not do anything else to locate Ibrahim.

Following Flannagan's testimony, the trial court summarized the relevant history, noting the dates of the offense, arraignment, preliminary hearing, original trial, and continued trial. The trial court then invited argument from counsel. Defense counsel argued that the People failed to exercise due diligence in establishing Ibrahim's unavailability. The trial court rejected defendant's argument, finding due diligence from the fact that the store was empty, the woman's telephone call to Flannagan, and the fact that no one suggested that Ibrahim was anywhere other than Jordan. The trial court also found no reason to believe that the People intentionally planned to use the preliminary hearing transcript in lieu of live testimony. Ibrahim's testimony was then read to the jury.

B. Relevant Law

"A criminal defendant has the right, guaranteed by the confrontation clauses of both the federal and state Constitutions, to confront the prosecutor's witnesses. [Citations.]" (*People v. Herrera* (2010) 49 Cal.4th 613, 620 (*Herrera*)). "Although important, the constitutional right of confrontation is not absolute. [Citations.] 'Traditionally, there has been "an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant [and] which was subject to cross-examination" [Citation.]' [Citation.] Pursuant to this exception, the preliminary hearing testimony of an

unavailable witness may be admitted at trial without violating a defendant's confrontation right." (*Herrera, supra*, at p. 621.)

This traditional exception is codified at Evidence Code section 1291, subdivision (a)(2): "Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] . . . [¶] The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." "Thus, when the requirements of [Evidence Code] section 1291 are met, the admission of former testimony in evidence does not violate a defendant's constitutional right of confrontation." (*Herrera, supra*, 49 Cal.4th at p. 621.)

"A witness who is absent from a trial is not 'unavailable' in the constitutional sense unless the prosecution has made a 'good faith effort' to obtain the witness's presence at the trial." (*Herrera, supra*, 49 Cal.4th at p. 622; see also Evid. Code, § 240, subd. (a)(5) ["'unavailable as a witness' means that the declarant is. . . . [¶] . . . [¶] [a]bsent from the hearing and the proponent of his or her statement has exercised *reasonable diligence* but has been unable to procure his or her attendance by the court's process"].) If there is "'no possibility of procuring the witness,'" then this good faith requirement "'demands nothing of the prosecution.'" (*Ibid.*) "'But, if there is a possibility, albeit remote, that affirmative measure might produce the declarant, the obligation of good faith *may* demand their effectuation.'" (*Ibid.*) The lengths to which the prosecution must go to produce a witness is a question of reasonableness. (*Ibid.*)

We review the trial court's determination de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 901.)

C. Analysis

Defendant contends that the trial court erred because Ibrahim was not unavailable. We disagree. The People presented considerable evidence concerning their efforts to locate Ibrahim, including visiting his business address, speaking with the clerk of a neighboring business, visiting his home, and speaking with a woman who identified

herself as his wife. Further, the People’s search was timely in that Flannagan began searching for Ibrahim on November 7, 2014, well before the start of trial. (*Herrera, supra*, 49 Cal.4th at p. 622.)

In urging reversal, defendant argues that the district attorney should have taken additional steps to procure Ibrahim at trial; he points out that the prosecution did not attempt to determine Ibrahim’s citizenship, did not record the name of the woman who claimed to be Ibrahim’s wife, did not confirm that Ibrahim had left the country, and did not obtain contact information for Ibrahim in Jordan. However, even if other avenues could have been pursued, “[t]hat additional efforts might have been made or other lines of inquiry pursued does not affect [the determination of due diligence]. [Citation.] It is enough that the People used reasonable efforts to locate the witness.” (*People v. Cummings* (1993) 4 Cal.4th 1233, 1298.) As set forth above, they did.

Defendant challenges the trial court’s finding that Ibrahim was unavailable by being in Jordan.⁴ He asserts that the prosecution could have at least asked Ibrahim to return to the United States. But, as set forth above, just because the prosecution could have taken additional steps to produce Ibrahim at trial does not mean that it did not exercise due diligence.

Defendant further argues that Ibrahim’s testimony should not have been used because it was unreliable. He claims that Ibrahim did not have mastery of the English language; therefore, pursuant to *People v. Johnson* (1975) 46 Cal.App.3d 701 (*Johnson*), Ibrahim’s preliminary hearing testimony should not have been used at trial. Aside from the facts that (1) the transcript of Ibrahim’s preliminary hearing testimony does not reveal his difficulty understanding English, and (2) defense counsel failed to raise this objection below (*People v. Abel* (2012) 53 Cal.4th 891, 924 [failing to make a timely evidentiary

⁴ Relying upon *People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1443 (*Sandoval*), defendant argues that the prosecution and the court could have done more. *Sandoval* is readily distinguishable. In conducting its reasonableness analysis, the *Sandoval* court noted “a treaty between the United States and Mexico concerning cooperation in criminal matters.” (*Sandoval, supra*, at p. 1438.) Defendant does not direct us to a similar agreement between the United States and Jordan.

objection forfeits the argument on appeal], *Johnson* is inapplicable. In *Johnson*, the defendant's conviction was based almost exclusively on the preliminary hearing testimony of a Spanish-speaking witness that was admitted at trial after the witness was shown to be unavailable. (*Johnson, supra*, at p. 703.) The trial court refused to admit defense evidence offered to impeach the interpreter's translation of the testimony given at the preliminary hearing. (*Id.* at p. 704.) The Court of Appeal held that the trial court erred in rejecting the proffered impeachment evidence since it may have revealed inaccuracies in the translation. (*Id.* at pp. 704–705.)

Here, in contrast, Ibrahim testified at the preliminary hearing in English. And, nothing in *Johnson* suggests that this testimony cannot be reliable by virtue of defendant's subjective belief that Ibrahim did not have mastery over the English language.

Defendant further argues that Ibrahim's preliminary hearing testimony should not have been admitted at trial because his defense counsel failed to make basic evidentiary objections and opted not to cross-examine him. What defendant overlooks is that “as long as a defendant was provided the *opportunity* for cross-examination, the admission of preliminary hearing testimony under Evidence Code section 1291 does not offend the confrontation clause of the federal Constitution simply because the defendant did not conduct a particular form of cross-examination that in hindsight might have been more effective.” (*People v. Carter* (2005) 36 Cal.4th 1114, 1173–1174.)

In a similar vein, defendant contends that his attorney's “inaction during the preliminary hearing was the functional equivalent of not having legal counsel. As such, no reasonable argument can be made that the preliminary hearing is a reliable form of hearsay.” Thus, he characterizes this situation as an “extraordinary case” and asks that we explore the actual cross-examination to determine the reliability of Ibrahim's testimony. We decline his request. Unlike the circumstances in *People v. Valencia* (2008) 43 Cal.4th 268, 293–294 [trial court's rulings at the preliminary hearing precluded a defendant from fully confronting the witness who later became unavailable to testify at trial] and *Ohio v. Roberts* (1980) 448 U.S. 56, 73, fn. 12, overruled on other grounds in

Crawford v. Washington (2004) 541 U.S. 36, defendant had the full opportunity to cross-examine Ibrahim at the preliminary hearing. Absent evidence in the record as to why counsel acted in the manner challenged, we will not question defense counsel's tactical decisions at that preliminary hearing. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267.)

DISPOSITION

The judgment is affirmed.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT